No. 87-1201

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1987

MYLES OSTERNECK, GUY-KENNETH OSTERNECK and MYLES OSTERNECK and GUY-KENNETH OSTERNECK as TRUSTEES for the BENEFIT of ROBERT OSTERNECK,

Plaintiffs-Petitioners,

v.

ERNST & WHINNEY,

Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS MYLES OSTERNECK, ET AL.

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Petitioners Myles Osterneck et al. ("the Osternecks") respectfully submit this supplemental brief in light of this Court's recent decision in Buckanan v. Stanships, Inc., No. 87-133 (U.S. March 21, 1988) (per curiam) (56 U.S.L.W. 3645). Buckanan reversed the Fifth Circuit's decision that a motion for costs can be a Rule 59(e) motion under the analysis in Harcon Barge Co. v. D & G Boat Rentals, Inc., 784 F.2d 665 (5th Cir. 1986) (en banc), cert. denied, 479 U.S. ____ (1986).

Buckanan supports the Osternecks' petition in several respects. First, Buckanan reaffirms the analysis of the scope of Rule 59(e) set out in White v. New Hampshire Dept. of Employment

Security, 455 U.S. 445 (1982):

> "'[T]he federal courts generally invoke Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits.' White, supra, at 457. In White, we held that a motion for attorney's fees under 42 U.S.C. §1988 was not a Rule 59(e) motion. We reasoned that because §1988 provides for fees independently of the underlying cause of action and only for 'a prevailing party,' a motion for fees required an inquiry 'separate from the decision on the merits - an inquiry that cannot even commence until one party has prevailed.' 455 U.S. at 451-452. [cit.] Such a motion therefore 'does not imply a change in the judgment, but merely seeks what is due because of of the judgment.'"

Buckanan, 56 U.S.L.W. at 364 (emphasis original).

Second, Buckanan shows that the White analysis is not limited to attorney's fees under 42 U.S.C. §1988.

Rather, Buckanan makes it clear that the White analysis extends to other cases,such as the present case, where the party is entitled to further relief because of the decision on the merits.

Third, Buckanan clarifies the use of the term "collateral" in the White analysis. In determining that the costs issue was collateral to the decision on the merits, Buckanan focused on the fact that the relief sought in the post-judgment motion was not provided in the statute upon which the underlying cause of action was based.

> "Because the Death on the High Seas Act contains no provision regarding costs, respondents' motion for costs necessarily was predicated on Federal Rule of Civil Procedure 54(d)....
> While a different issue may be presented if expenses of this sort were provided as an aspect of the underlying action, we are

> satisfied that a motion for costs filed pursuant to Rule 54(d) does not seek 'to alter or amend the judgment' within the meaning of Rule 59(e). Instead, such a request for costs raises issues wholly collateral to the judgment in the main cause of action, issues to which Rule 59(e) was not intended to apply."

Id. Thus, because the relief sought by the post-judgment motion was not provided in the statute upon which the cause of action was based, it necessarily involved an independent and separate inquiry from the decision on the merits.

Similar to the relief sought in Buckanan, the relief sought by the Osternecks' motion was not provided for by the statute upon which the underlying cause of action was based. The underlying cause of action in the present case was based on §10(b) of the Securities Act of 1934 and Rule 10b-5.

Neither §10(b) nor Rule 10b-5, however, provides for prejudgment interest. See Blau v. Lehman, 368 U.S. 403 (1962); Wolf v. Frank, 477 F.2d 467 (5th Cir. 1973). Instead, like 42 U.S.C. §1988 attorney's fees and the costs in Buckanan, the prejudgment interest was based on independent grounds, in this case of the equitable powers of the federal courts. Id. Indeed, the decision to award prejudgment interest on a federal securities claim involves many of the same considerations as are involved in a decision to award attorneys fees under §1988, such as, the delay in obtaining the judgment, the nature of the claim and the relief obtained. Id.; Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974). Moreover, the federal judge has the discretion to entirely deny

both §1988 attorney's fees and prejudgment interest on a securities claim if the equities demand. Blau, supra; White, supra; Johnson, supra; Wolf, supra.

Accordingly, the Osternecks' motion for prejudgment interest necessarily involved an independent and separate inquiry from the decision on the merits of their claim, an inquiry which could not even commence until after the Osternecks had prevailed on the merits of their securities claim. In fact, the decision to award prejudgment interest was not even made until six months after entry of the verdict and judgment which held certain defendants liable under §10(b) and Rule 10b-5.

Buckanan also focused on the fact that a motion for costs need not delay

entry of judgment as a further indication that the relief sought by the post judgment motion was collateral to the underlying cause of action. In the present case the District Court found that the motion for prejudgment interest need not delay the entry of judgment. Indeed, in the present case the District Court expressly deferred consideration of prejudgment interest so that judgment on the merits could be promptly entered. See Petition at App. 3. Because the Osternecks' motion did not need to delay entry of judgment on the merits of their claim, it necessarily involved issues wholly collateral to the underlying cause of action, issues to which Rule 59(e) was not intended to apply. Like the motion for attorney's fees under §1988 and a motion for costs, the Osternecks' motion

"sought only what was due because of the judgment." See Buckanan, supra, 56 U.S.L.W. at 3646.

That the Osternecks' motion raised issues collateral to the merits of the main cause of action is also demonstrated by the District Court's order granting the motion. In the order, the District Court considered only facts and circumstances concerning the litigation itself which occurred after the cause of action arose and which resulted in the delay in bringing the case to trial. For example, the District Court stated that "[a]nother matter which contributed to some delay is the fact, that due to changes in judicial personnel in this district, this case has been assigned to five different district judges at various times." Petition at App. 11-12. Such

considerations clearly are collateral to the decision on the merits of the underlying cause of action.

Moreover, citing Norte & Co. v. Huffines, 416 F.2d 1189, 1191 (2d Cir. 1969), the order shows that while prejudgment interest is compensatory, it only compensates the plaintiff for the delay between recovery and the wrongdoing and is not meant to punish the defendant based on the merits of the plaintiff's claims. Petition at App. 10-11. The order, therefore, is consistent with the principle long established by this Court that, while prejudgment interest is compensatory, it "does not form the basis of the action, but is an incident to the recovery of the principal ...," and is only demanded "in respect of the detention" of the principal claim.

Stewart v. Barnes, 153 U.S. 456, 462-63 (1984) (emphasis added). Thus, although both prejudgment interest and attorney's fees under §1988 are compensatory damages which may be necessary to make the plaintiff fully "whole," see Johnson, supra; Wolf, supra; neither is an aspect of the merits of the underlying action. Buckanan, supra; Jenkins v. Whittaker Corp., 785 F.2d 720 (9th Cir. 1986).

Fourth, Buckanan concludes that an inaccurate designation of a motion to amend cannot deprive a party of the benefit of his timely notice of appeal. In the present case, however, the Eleventh Circuit placed great emphasis on the fact that the judgment granting the prejudgment interest was labeled "Amended Judgment." Osterneck v. E.T. Barwick Industries, 825 F.2d 1521, 1528 n. 11

(11th Cir. 1987).

All the above points show that the Eleventh Circuit's opinion that the Osternecks' motion for prejudgment interest was a Rule 59(e) motion conflicts with this Court's rulings in Buckanan and White, and that certiorari should be granted to address this conflict.

In addition to the above points, Buckanan supports the Osternecks' petition because it acknowledges the tension and conflict among the circuits resulting from the different approaches to Rule 59(e). While the Buckanan decision did resolve such tension and conflict as far as motions for costs are concerned, it did not resolve the conflict with regard to motions for prejudgment interest. Accordingly, the

Osternecks respectfully request this Court to grant their petition so that the tension and conflict among the circuits and the decisions of this Court with regard to motions for prejudgment interest can be resolved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served three copies of the within and foregoing **Supplemental Brief of Petitioners Myles Osterneck, Et Al.** on all parties required to be served by depositing the same in the United States mail, postage prepaid, to the following:

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This 11th day of April, 1988.

Paul Webb

PAUL WEBB, JR.